

United States District Court

For the Northern District of California

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

11	JOSE GILBERTO HERNANDEZ,)	No. C 09-00165 JW (PR)
12	Petitioner,)	ORDER TO SHOW CAUSE;
13	vs.)	DENYING MOTION TO PROCEED
14	D. K. SISTO, Warden,)	<i>IN FORMA PAUPERIS AS MOOT</i>
15	Respondent.)	
16)	(Docket No. 7)

Petitioner, an inmate at California State Prison - Solano, in Vacaville, proceeding pro se, seeks a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, challenging the 2006 decision by the Board of Parole Hearings (the “Board”) finding petitioner unsuitable for parole. Petitioner has paid the filing fee.

BACKGROUND

According to the petition, petitioner pleaded no contest in San Mateo County Superior Court to second degree murder and escape from county jail and was sentenced to a term of fifteen years-to-life with a three enhancement in state prison on March 11, 1994. On June 10, 2006, the Board found petitioner unsuitable for

1 parole after his second parole consideration hearing. Petitioner challenged the
2 Board's decision by filing habeas petitions in the state courts. The California
3 Supreme Court denied the petition on December 23, 2008. Petitioner filed the
4 instant federal petition on January 13, 2009.

5
6 **DISCUSSION**

7 **A. Standard of Review**

8 This Court may entertain a petition for writ of habeas corpus "in behalf of a
9 person in custody pursuant to the judgment of a state court only on the ground that
10 he is in custody in violation of the Constitution or laws or treaties of the United
11 States." 28 U.S.C. § 2254(a); Rose v. Hodges, 423 U.S. 19, 21 (1975).

12 A district court shall "award the writ or issue an order directing the
13 respondent to show cause why the writ should not be granted, unless it appears from
14 the application that the applicant or person detained is not entitled thereto." 28
15 U.S.C. § 2243.

16 **B. Petitioner's Claims**

17 Petitioner seeks federal habeas corpus relief from the Board's June 10, 2006
18 decision finding petitioner unsuitable for parole on the grounds that 1) the denial
19 violates petitioner's right to due process, and 2) it violates the terms of his plea
20 agreement. Liberally construed, petitioner's claims appear cognizable under § 2254
21 and merit an answer from respondent.

22
23 **CONCLUSION**

24 For the foregoing reasons and for good cause shown,

25 1. Petitioner's motion for leave to proceed in forma pauperis (Docket No.
26 7) is DENIED as moot since petitioner has paid the filing fee. (See Docket No. 4.)

27 2. The clerk shall serve by certified mail a copy of this order and the
28 petition and all attachments thereto on respondent and respondent's attorney, the

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1 Attorney General of the State of California. The clerk also shall serve a copy of this
2 order on petitioner.

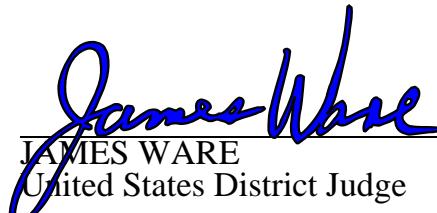
3 3. Respondent shall file with the court and serve on petitioner, within
4 **ninety (90) days** of the issuance of this order, an answer conforming in all respects
5 to Rule 5 of the Rules Governing Section 2254 Cases, showing cause why a writ of
6 habeas corpus should not be issued. Respondent shall file with the answer and serve
7 on petitioner a copy of all portions of the state trial record that have been transcribed
8 previously and that are relevant to a determination of the issues presented by the
9 petition.

10 If petitioner wishes to respond to the answer, he shall do so by filing a
11 traverse with the court and serving it on respondent within **thirty (30) days** of his
12 receipt of the answer.

13 4. Respondent may file a motion to dismiss on procedural grounds in lieu
14 of an answer, as set forth in the Advisory Committee Notes to Rule 4 of the Rules
15 Governing Section 2254 Cases. If respondent files such a motion, petitioner shall
16 file with the court and serve on respondent an opposition or statement of non-
17 opposition within **thirty (30) days** of receipt of the motion, and respondent shall file
18 with the court and serve on petitioner a reply within **fifteen (15) days** of receipt of
19 any opposition.

20 5. Petitioner is reminded that all communications with the court must be
21 served on respondent by mailing a true copy of the document to respondent's
22 counsel. Petitioner must also keep the court and all parties informed of any change
23 of address.

24 DATED: May 19, 2009

25
26 
27 JAMES WARE
28 United States District Judge

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

JOSE GILBERTO HERNANDEZ,

Case Number: CV09-00165 JW

Petitioner,

CERTIFICATE OF SERVICE

v.

D K SISTO, Warden,

Respondent.

/

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on 5/28/2009, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Jose Gilberto Hernandez J-12875
California State Prison - Solano
2100 Peabody Road
P. O. Box 4000
Vacaville, Ca 95696-4000

Dated: 5/28/2009

Richard W. Wiking, Clerk
/s/ By: Elizabeth Garcia, Deputy Clerk